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In the Supreme Court of the United States

OCTOBER TERM, 1974

J. WILLIAM MIDDENDORF, II, ET AL., PETITIONERS

v.

DANIEL EDWARD HENRY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the Secretary of the Navy, *et al.*,* petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

*The petitioners in this case are: J. William Middendorf, II, Secretary of the Navy; Admiral James L. Holloway, III, United States Navy, Chief of Naval Operations; General Robert E. Cushman, United States Marine Corps, Commandant; Major General William R. Quinn, United States Marine Corps, Commanding General, Third Marine Aircraft Wing, Marine Corps Air Station, El Toro, Santa Ana, California; and Brigadier General R. W. Taylor, United States Marine Corps, Commanding General, Marine Corps Air Station, El Toro, Santa Ana, California.

Respondents are: Daniel Edward Henry, John Thomas Kirby, Kenneth Wayne McLean, David Alan Haecker, A. C. Jackson, and Aubry Duglass Mims, individually and on behalf of all persons similarly situated, and Stephen L. Bray, II, and Michael A. Ness, intervenors.

OPINION BELOW

The court of appeals rendered no opinion. The opinion of the district court (App. C, *infra*, p. 4a) is reported at 357 F. Supp. 495.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, p. 1a) was entered on March 27, 1974. The order of the court of appeals denying the petition for rehearing and rejecting the suggestion for a rehearing *en banc* (App. B, *infra*, p. 3a) was entered May 23, 1974. On June 21, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including August 24, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Article 20 of the Uniform Code of Military Justice (10 U.S.C. 820) provides:

> Subject to section 817 of this title (article 17), summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary court-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard-labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.

QUESTIONS PRESENTED

1. Whether the Constitution requires that the military services must provide counsel to an accused in a summary court martial, and, if so, under what circumstances.

2. Whether any such requirement should be given retroactive effect.

STATEMENT

1. In February, 1973, respondents—then members of the United States Marine Corps stationed at Marine Corps Air Station, El Toro, Santa Ana, California—brought this class action in the United States District Court for the Central District of California challenging the authority of the military to try them at summary courts-martial without providing assistance of counsel. All respondents had been charged with relatively minor offenses in violation of the Uniform Code of Military Justice ("UCMJ"). Five of the respondents, including two who later intervened in the case, had been convicted by summary courts-martial and sentenced, *inter alia*, to short periods of confinement at hard labor.[1] Three other respondents

[1] Respondents Henry, Kirby, McLean, Bray, and Ness were charged with unauthorized absence, in violation of Article 86 of the Code (10 U.S.C. 886). Respondent McLean was charged in addition with misbehavior as a sentry on post, in violation

and numerous intervenors had been ordered to stand trial at summary courts-martial which had not yet convened.[2] In accordance with procedures applicable when respondents sought relief in the district court, those who were tried and convicted had not been provided representation by counsel at their summary courts-martial, and those who were awaiting trial had been informed that counsel would not be provided.

Alleging in their petition and complaint to the district court that they, and all others similarly situated, had been and were being denied their constitutional right to assistance of counsel at summary courts-martial, respondents sought (*inter alia*) the following relief: (1) permission to proceed as a class action, on behalf of all members of the Navy and Marine Corps who had been, were, or would be subject to trial by summary court-martial without having been advised of the right to assistance of counsel; (2) writs of *habeas corpus* to release respondents who were in confinement; (3) an injunction against future confinement resulting from summary courts-martial in which accused were not given the opportunity to be represented by counsel, together with declaratory and mandatory relief; and (4) an order vacating the court-martial convictions of those respondents who had been convicted and restoring all rights lost as a result thereof.

of Article 113 (10 U.S.C. 913), and disrespect to a noncommissioned officer, in violation of Article 91 (10 U.S.C. 891). Respondent Ness was sentenced to confinement at hard labor for 27 days; the others were sentenced to confinement at hard labor for 30 days.

[2] Respondents Haecker and Mims were charged with unauthorized absence. Respondent Mims was also charged with making several unauthorized telephone calls, in violation of Article 134 (10 U.S.C. 934), and disobeying an order of a noncommissioned officer, in violation of Article 92 (10 U.S.C. 892). Respondent Jackson was charged with assault, in violation of Article 134. The intervenors were charged with various similar infractions.

2. In its Memorandum Opinion (App. C, *infra*, p. 4a), the district court concluded that in light of *Argersinger* v. *Hamlin*, 407 U.S. 25—in which this Court held that the Sixth Amendment prohibits imprisonment for misdemeanors or petty offenses unless the accused has been represented by counsel or has waived that right—accused servicemen at summary courts-martial resulting in confinement must be provided the opportunity to be represented by counsel. In its judgment (App. D, *infra*, p. 20a), the court granted substantially all the requested relief, including the release of those respondents who were confined and an injunction (of world-wide scope) prohibiting the Navy and Marine Corps from conducting summary courts-martial resulting in confinement, unless accused were advised of their rights under *Argersinger* and unless, in the absence of waiver, they were provided counsel both prior to and during the court-martial proceedings. The court of appeals stayed this judgment pending disposition of the appeal (App. E, *infra*, p. 24a), and this Court denied respondents' application to vacate the stay (App. F, *infra*, p. 25a).

3. While this case was on appeal, the Ninth Circuit decided *Daigle* v. *Warner* (App. G, *infra*, p. 26a), 490 F. 2d 358. There, the court ruled that this Court's holding in *Argersinger* did not apply to summary courts-martial, but that the Due Process Clause of the Fifth Amendment did require counsel to be made available to

accused at summary courts-martial under some circumstances. Adopting the due process standards for revoking probation set forth in *Gagnon* v. *Scarpelli*, 411 U.S. 778, with special reference to military exigencies, the court of appeals held (App. G, *infra*, pp. 39a–40a):

> [C]ounsel must be appointed for the accused before a summary court-martial only where the accused makes a request based on a timely and colorable claim (1) that he has a defense, or (2) that there are mitigating circumstances, and the assistance of counsel is necessary in order adequately to present the defense or mitigating circumstances. Moreover, even when such a request is made, if, due to the exigencies of military operations, qualified counsel is not reasonably available, the military may nevertheless proceed if the rights of the accused will not be unduly prejudiced.[3]

"Under the compulsion" of the *Daigle* opinion, the Ninth Circuit panel in the instant case vacated the orders and judgment of the district court and remanded the cause for reconsideration in the light of *Daigle* (App. A, *infra*, p. 1a). Respondents' petition

[3] A petition for a writ of certiorari has been filed in *Daigle* by the accused servicemen, who assert that there is both a Sixth Amendment right to counsel at summary courts-martial and a Fifth Amendment right which is not limited to the circumstances elaborated by the Ninth Circuit. The government is acquiescing in that petition for a writ of certiorari since the issues presented complement those presented here. *Crosby, et al.* v. *Warner*, No. 73-6642, appeal pending.

for rehearing and suggestion for rehearing *en banc* were denied (App. B, *infra*, p. 3a).[4]

REASONS FOR GRANTING THE WRIT

This case presents a constitutional issue of fundamental importance to the administration of military justice on which the courts of appeal are in conflict: When, if ever, do members of the armed forces have the right to be represented by counsel at summary courts-martial?[5]

[4] On August 29, 1974 respondents filed a petition for certiorari seeking review of the portions of the judgment below which are adverse to them. See *Henry* v. *Middendorf*, No. 74-5176.

[5] We note at the outset two possible objections to this Court's consideration of this case, neither of which we believe is substantial:

1. Though respondents have not filed a petition for relief with the Judge Advocate General of the Navy pursuant to Article 69 (10 U.S.C. 869)—a channel of review which normally must be traversed—in the circumstances of this case exhaustion of this single remaining remedy ought not to be required. The Judge Advocate General of the Navy has received seven Article 69 petitions which allege as error the conducting of summary courts-martial resulting in confinement without providing counsel to the accused. In each case, the Judge Advocate General has deferred consideration of the petition until litigation on this issue in the federal courts, including this case, has been completed. See *Parisi* v. *Davidson*, 405 U.S. 34; *Gusik* v. *Schilder*, 340 U.S. 128, 132.

2. Nor do we believe that this case is moot.

Exercising *habeas corpus* jurisdiction under 28 U.S.C. 2241, the district court ordered the release from confinement of respondents Henry, Kirby, McLean, Bray and Ness. None of these respondents is now subject to further confinement resulting from the courts-martial at issue; all either have been discharged from active duty in the Marine Corps or have completed the periods of confinement imposed at the courts-martial. But once *habeas* jurisdiction attached in the district court, it was not defeated by a subsequent termination of confinement; moreover, the validity of the convictions and of the forfeitures of pay ordered at the

The purpose of the summary court-martial, as stated in Paragraph 79a of the *Manual for Courts-Martial*, 1969 (Rev.),[5] "is to exercise justice promptly for relatively minor offenses under a simple form of procedure." Cf. *Parker* v. *Levy*, No. 73–206, decided June 19, 1974, slip op. 14–16.[6]

courts-martial remain in dispute. *Carafas* v. *LaVallee*, 391 U.S. 234.

The situation of those respondents who at the time this action was brought were still awaiting trial by summary court-martial is different. We submit that no federal civilian court has ever acquired jurisdiction over their claims, since, as we argued in our Supplemental Brief in *Secretary of the Navy* v. *Avrech*, No. 72–1713, the legislative history of Article 76 (10 U.S.C. 876), shows that Congress intended to limit civilian court review of court-martial proceedings to petitions for *habeas corpus* seeking release from custody. (We are sending copies of that brief to counsel for respondents.)

[5] Article 36 of the UCMJ (10 U.S.C. 836) authorizes the President to prescribe regulations implementing the Code's provisions. These regulations appear in *Manual for Courts-Martial*, 1969 (Rev.) ("*Manual*").

[6] Article 16(3) of the UCMJ, 10 U.S.C. 816(3), provides that a summary court-martial consists of "one commissioned officer." Paragraph 79 of the *Manual* describes the role of the summary court-martial officer. The basic instruction defining that role is that he "will thoroughly and impartially inquire into both sides of the matter and will assure that the interests of both the Government and the accused are safeguarded." He is required before trial to advise the accused of his rights, including his right to remain silent and his right to refuse summary court-martial. During the presentation of evidence, the summary court-martial officer must examine prosecution witnesses, permit the accused to cross-examine, and even aid in cross-examination. He is also required to obtain and examine witnesses requested by the accused. If the accused is found guilty, the summary court-martial officer must advise him of his right to present evidence in extenuation and mitigation of the offense.

If the accused desires more elaborate procedure, he may refuse to accept the summary court-martial. In such a case he,

Accordingly, the summary court-martial may award only relatively low levels of punishment. The maximum sentences are: 30 days confinement at hard labor; 45 days hard labor without confinement; two months restriction to specified limits; reduction to the lowest pay grade; or forfeiture of two-thirds pay for one month. 10 U.S.C. 820. Its function is thus to provide a means for expeditiously imposing moderate penalties for conduct which violates military obligations, but is not serious enough to warrant a full scale court-martial.[7]

1. In enacting the Uniform Code of Military Justice and the amendments thereto, Congress did not intend to provide a right to the assistance of counsel in summary courts-martial. See *United States* v. *Alderman*, 22 U.S.C.M.A. 298, *Betonie* v. *Sizemore*, 496 F. 1001, 1006 (C.A. 5), *Daigle* v. *Warner*, *infra*, App. G, pp. 32a–33a; cf. Article 27(a) of the Code, 10 U.S.C. 827(a).

But after this Court held in *Argersinger* v. *Hamlin*, *supra*, 407 U.S. 25, that the Sixth Amendment forbids any imposition of confinement for misdemeanors or petty offenses unless a civilian accused is afforded the opportunity to be represented by counsel, several appellate courts concluded that there was a similar

in effect, demands either a dismissal of the charges or referral of the case to a special or general court-martial—at which he would be entitled to representation by counsel and complete courtroom procedure. 10 U.S.C. 820.

[7] The Department of the Navy has provided the following statistics with regard to the numbers of summary courts-martial:

Fiscal year	Navy	Marine Corps
1970	5,958	7,351
1971	6,161	7,916
1972	4,890	6,418
1973	4,658	6,664

constitutional right to counsel in the military. See *United States* v. *Alderman, supra, Betonie* v. *Sizemore, supra.*

The Ninth Circuit, in *Daigle* v. *Warner, infra,* App. G, p. 26a and this case, took a somewhat different approach. It correctly recognized that the Sixth Amendment was not intended to apply to trials before courts-martial, and refused to extend this Court's conclusion concerning the civilian trial involved in *Argersinger* to the Military (App. G, *infra,* pp. 34a-37a). But it went on to hold that there is a limited Fifth Amendment right to the assistance of counsel at summary courts-martial, relying in substantial part on this Court's conclusion in *Gagnon* v. *Scarpelli, supra,* that such a right exists in probation revocation hearings (App. G., *infra,* pp. 37a-40a). Cf. *Wolff* v. *McDonnell,* No. 73-679, decided June 26, 1974.[9]

The Court of Military Appeals and the Fifth Circuit, believing that the Sixth Amendment applies, make the right to counsel at summary courts-martial turn on whether the accused may be sentenced to confinement; the touchstone used by the Ninth Circuit in

[9] Two other views on this question have also emerged from the appellate courts: Judge Darden, of the Court of Military Appeals, in dissent in *United States* v. *Alderman, supra,* and Judge Trask, concurring and dissenting both in *Daigle* v. *Warner, supra,* and in this case, have expressed the view that accused have no right to representation by counsel at summary courts-martial; Judges Ely and Hufstedler of the Ninth Circuit, while following the rule of *Daigle* as the law of the circuit, expressed the view in the instant case that the due process clause of the Fifth Amendment requires the military services to provide accused with the opportunity to be represented by counsel at summary courts-martial "absent emergency circumstances" (App. A, *infra,* p. 1a).

Daigle and in this case under the Fifth Amendment is the complexity of the facts surrounding the alleged offense.[9] Each rule requires counsel to be provided in cases in which the other rule would not require counsel.[10] Thus, the military services are faced with two conflicting and overlapping rules setting forth the circumstances in which counsel must be provided to

[9] See App. G, *infra,* pp. 39a–40a:

"[C]ounsel must be appointed for the accused before a summary court-martial only where the accused makes a request based on a timely and colorable claim (1) that he has a defense, or (2) that there are mitigating circumstances, and the assistance of counsel is necessary in order adequately to present the defense or mitigating circumstances. Moreover, even when such a request is made, if, due to the exigencies of military operations, qualified counsel is not reasonably available, the military may nevertheless proceed if the rights of the accused will not be unduly prejudiced."

[10] The holding in *Daigle* may not be limited to cases in which the accused is sentenced to incarceration by a summary court-martial, since the Fifth Amendment applies to any deprivation of "liberty" or "property". See *Wolff* v. *McDonnell, supra,* No. 73-679, decided June 26, 1974. Federal courts following the *Daigle* rule might entertain *habeas corpus* attacks against summary court proceedings even in the absence of confinement, provided the accused was subject to some significant form of restraint. Under Article 20, 10 U.S.C. 820, a summary court may award punishment such as restriction to specified limits or hard labor without confinement—restraints which, arguably, are sufficiently "custodial" to justify *habeas* relief. See *Jones* v. *Cunningham,* 371 U.S. 236.

By contrast, the Court of Military Appeals has held that deprivation of liberty other than confinement does not trigger the *Argersinger* right to counsel. *United States* v. *Alderman, supra; United States* v. *Shamel,* 22 U.S.C.M.A. 361, 47 C.M.R. 116.

accused at summary courts-martial. Only a decision by this Court can eliminate the conflict.[11]

Neither *Argersinger* nor *Gagnon* justifies the conclusion that there is a constitutional right to the assistance of counsel in summary courts-martial. Both cases arose in the context of civilian proceedings, and the Court's analyses of the principles involved contain no reference to military proceedings. We submit that these cases should not be extended by analogy to the military, which "[t]his Court has long recognized * * * is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history." *Parker* v. *Levy, supra,* No. 73–206, decided June 19, 1974, slip op. at 8–9. See also *O'Callahan* v. *Parker,* 395 U.S. 258; *Dynes* v. *Hoover,* 20 How. 65.

Here, as in the First Amendment area which the Court considered in *Levy,* "the fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it" (*id.* at 23–24). In enacting the Uniform Code of Military Justice, the Congress recognized the importance of the unique military need to maintain discipline by providing a means for imposing relatively minor sanctions through a simple, fair procedure, the summary court-martial. Cf. *Wolff* v. *McDonnell, supra,* No. 73–679, decided June 26, 1974. The ready availability of these procedures is particularly important in maintaining discipline aboard ships at sea, or in isolated outposts in time of war.[12]

Moreover, the accused in a summary court-martial is in a significantly different position than the defendant in a civilian court, or the probationer facing revocation of his parole. As this Court emphasized in *Levy,* the military is a discrete community with its own traditions, in which the "Government is often employer, landlord, provisioner and law giver rolled into one" (*id.* at 16). The summary court officer epitomizes this unique relationship; he is charged with the responsibility of inquiring impartially into both sides of the matter before him, and safeguarding the interests of the accused as well as the government. Since there is no prosecutor in summary courts-

[11] The military services are bound by the decisions of the Court of Military Appeals. Therefore, when that court in *Alderman* concluded, one month after the decision of the district court in the instant case, that there was a Sixth Amendment right to the assistance of counsel in summary courts, the Navy issued conforming regulations, which require counsel to be provided the accused at any summary court-martial in which the court is empowered to award confinement. SECNAV 082237Z/52 of June 8, 1973. The Army has similar regulations. D.A. Msg. P101203Z of July 10, 1972. Air Force regulations require counsel to be provided at all summary courts-martial. A.F. Military Justice Guide, A.F. Man. 111–1, par. 3–6c, of July 2, 1973.

[12] It is relatively less important to the Air Force, which convenes summary courts-martial only infrequently, and, when it does, has provided counsel at the request of the accused since before *Argersinger.* The Army has provided counsel at the request of an accused in a summary court-martial which has power to sentence to confinement since shortly after *Argersinger* was decided in 1972. See note 11, *supra; United States* v. *Alderman, supra,* 22 U.S.C.M.A. at 303 (concurring opinion). But the problem posed by this case is an immediate, not a prospective, one for the Navy, which maintains ships at sea for extended periods even during peace time.

martial, the presence there of defense counsel would overturn the balanced procedure Congress provided and create a procedure that would unduly favor the defendant. If the summary court officer attempts to compensate for this imbalance by adopting a more prosecutorial role, the presence of defense counsel may actually damage the interests of the accused. Cf. *Figueroa Ruiz* v. *Delgado*, 359 F. 2d 718 (C.A. 1).

The court of appeals in *Daigle* recognized that the military may at times need to impose disciplinary sanctions when legal counsel is not available. It attempted to permit summary courts-martial in such situations by providing that "if, due to the exigencies of military operations, qualified counsel is not reasonably available, the military may nevertheless proceed if the rights of the accused will not be unduly prejudiced" (App. G, *infra*, pp. 39a–40a). This provision, although necessary to recognize the needs of the military, when added to the *Gagnon* v. *Scarpelli* test, which involves consideration of the complexity of claimed defenses and mitigating circumstances, make the *Daigle* rule nearly impossible for the military to administer. That rule requires the officer convening the court-martial to determine in each case whether due process requires that the accused be provided counsel. To make such a determination, this officer—a non-lawyer, often without immediate access to legal counsel himself—must make delicate judgments about the facts surrounding the alleged offense. Such judgments are extremely difficult to make in advance of trial. Moreover,

the requirement that the officer convening the court make pretrial judgments regarding the defense or mitigating circumstances asserted by the accused may well conflict with that officer's role in reviewing the courtmartial record, as required by Articles 60 and 64 of the UCMJ (10 U.S.C. 860 and 864).[13]

None of the federal courts which have required counsel at summary courts-martial, including the court of appeals in this case, has explicitly struck down as unconstitutional any portion of the Uniform Code of Military Justice. But all these courts have interpreted the Constitution as requiring a significant distortion in summary court-martial procedure as contemplated by Congress. The needs of the military justice system are unique, and the summary court-martial is, in significant respects, unlike either the civilian misdemeanor proceeding discussed in *Argersinger* or the revocation of probation proceeding discussed in *Gagnon* v. *Scarpelli, supra*. We submit that both the *Alderman* rule and the *Daigle* rule are erroneous, and that the summary court-martial should be permitted to reassume the form intended by Congress.[14]

[13] By contrast the rules established by the courts in *Alderman* and *Betonie*, while they may impair military discipline and are erroneous in our view, are easy to administer: counsel must always be provided, regardless of military exigencies, in any case in which the court-martial may impose confinement.

[14] We note that the instant case, *Daigle* and perhaps *Betonie*, are likely to be the only cases in which this Court will have the opportunity to determine whether, contrary to Congressional intent, counsel must be provided at summary courts-

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2. The retroactive application of *Daigle* by the court of appeals in the instant case presents additional problems of serious concern to the government. The summary courts-martial at issue here all took place in February, 1973, eight months prior to the court of appeals decision in *Daigle*. The court of appeals, however, remanded this case to the district court for reconsideration in light of *Daigle*, thereby giving the *Daigle* rule retroactive effect.

Retroactive application of a rule requiring counsel at summary courts-martial, whether it be the *Daigle* rule or the *Argersinger* rule, would invalidate thousands of summary court-martial convictions.[13] It could also invalidate thousands of punishments imposed at special and general courts-martial, in which summary court-martial convictions of the accused were admitted, during the presentencing procedure, as evidence in aggravation of the offense. *Manual*, Para-

martial. The cases arose before *Alderman*, by which the military services are currently bound.

Of course, there may be future claims for back pay brought in federal courts involving pre-*Alderman* convictions by summary courts at which no counsel was provided.

[13] Moreover, although the *Argersinger* rule would be relatively easy to apply retroactively, since only those convictions which resulted in incarceration would be affected, the *Daigle* rule would be practically impossible so to apply. The considerations which *Daigle* found to be determinative of the right to the assistance of counsel are not generally reflected in the record of a summary court-martial; therefore, there would usually be no way to determine whether an accused at a summary court conducted years ago would have been entitled to counsel under the *Daigle* rule.

graph 75*b*(2). See *United States* v. *Alderman*, *supra*. As a result, the government might have to reimburse service members for the pay forfeited and for the pay lost by reductions in grade adjudged at these courts-martial. Forfeitures of pay and reductions in grade are routine punishments at courts-martial—probably far more routine than fines actually collected in civilian proceedings, since many defendants in civilian proceedings are indigent. Hence, retroactive application of a rule requiring counsel at summary courts-martial would create enormous economic and administrative burdens for the government.

This Court held in *Berry* v. *City of Cincinnati*, 414 U.S. 29, that the *Argersinger* rule is retroactive as to those who allege and prove a case or controversy within the jurisdiction of the federal courts. Presumably, this qualification will limit the number of state and federal claims alleging past violations of the *Argersinger* rule, but it will not limit the number of claims resulting from summary courts-martial. If the right to counsel at summary court-martial, under either *Daigle* or *Argersinger* is retroactive, persons who were denied that right in the past—no matter how remote—may petition the Judge Advocate General for relief under Article 69 of the UCMJ (10 U.S.C. 869). No limitations period and, of course, no civilian jurisdictional requirements, apply to this review.

Moreover, the retroactive application of the *Daigle* rule by the court of appeals in this case is contrary to the precedents on which *Daigle* was based. In *Daigle*, the court of appeals relied on *Gagnon* v. *Scarpelli*,

supra. In *Gagnon*, this Court, in turn, relied on *Morrissey* v. *Brewer*, 408 U.S. 471, which held that the due process requirements stated therein applied only to future proceedings (id. at 490). Even assuming that the *Daigle* rule is correct, it should be treated like the rule of *Morrissey* and afforded only prospective application.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1974.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 73-1694

DANIEL EDWARD HENRY, ETC., ET AL., INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, AND STEPHEN L. BRAY, II, AND MICHAEL A. NESS, INTERVENORS, PLAINTIFFS-APPELLEES

v.

HONORABLE JOHN E. WARNER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE NAVY, ET AL., DEFENDANTS-APPELLANTS

Order

[March 27, 1974]

[Publish]

Before: ELY, HUFSTEDLER, and TRASK, *Circuit Judges.*

Under the compulsion of this court's opinion in *Daigle* v. *Warner* (9th Cir. 1973) 490 F.2d 358, the orders and judgment are ordered vacated and the cause is remanded to the district court for reconsideration in the light of *Daigle*.*

*Judges Ely and Hufstedler disagree with the holding of *Daigle* in that both believe that, absent emergency circumstances, the due process clause requires the appointment of counsel or a counsel substitute in all summary courts martial, without the limitations placed upon that right by the majority of the *Daigle* panel. Judge Ely adds his thought that if, under Supreme Court authority, a civilian is entitled to the assistance

of an attorney in a hearing wherein the risk is no more than minimal confinement, then one in the military service of his country, facing much graver consequences, should be entitled to the same consideration. Judge Trask adheres to his views expressed, concurring and dissenting, in *Daigle*. All members of this panel, however, follow *Daigle* because it is the law of this circuit.

APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 73-1694

DANIEL EDWARD HENRY, ETC., ET AL., INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, AND STEPHEN L. BRAY, II, AND MICHAEL A. NESS, INTERVENORS, PLAINTIFFS-APPELLEES

v.

HONORABLE JOHN E. WARNER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE NAVY, ET AL., DEFENDANTS-APPELLANTS

Order

Before: ELY, HUFSTEDLER, and TRASK, *Circuit Judges*.

The panel as constituted in this case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

United States District Court, C.D. California

No. 73-354-DWW

April 13, 1973

DANIEL EDWARD HENRY, ETC., ET AL., INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, AND STEPHEN L. BRAY II AND MICHAEL A. NESS, INTERVENORS, PETITIONER-PLAINTIFFS

v.

HONORABLE JOHN E. WARNER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE NAVY, ET AL., RESPONDENTS-DEFENDANTS

Memorandum opinion

DAVID W. WILLIAMS, *District Judge.*

The Petitioners-Plaintiffs (hereinafter Petitioners) are either members of the United States Navy or the Marine Corps and they have been charged with relatively minor offenses which constitute violations of the Uniform Code of Military Justice (hereinafter UCMJ). Petitioners, Henry and Kirby were charged with "unauthorized absence;" McLean was charged with the same offense, "misbehavior of sentry on post," and "disrespect to a non-commissioned officer." Each was convicted at a summary court-martial proceeding at which he was not represented by legal counsel and each was ordered confined for a period not to exceed 30 days. Petitioners Haecker, Jackson, Mims and Petitioner-Plaintiff-Intervenors (hereinafter Petitioners) were charged with various similar infrac-

tions and ordered to stand trial at a summary court-martial on a date yet to be fixed, at which no legal counsel would be provided.

The UCMJ, 10 U.S.C. 816(3), 820 and 824 creates a "summary court-martial consisting of a non-commissioned officer" which is given jurisdiction to try all persons subject to the UCMJ except officers, cadets, aviation cadets and midshipmen, for non-capital offenses, and is authorized to adjudge punishment upon conviction no greater than confinement at hard labor for one month and certain ancillary punishment. At the outset of a summary court-martial an accused is advised by the summary court officer of the nature of the charges against him, "by whom he is accused", a general statement of his right to plead not guilty and confront witnesses against him, to present evidence in his own behalf and to be assisted in this endeavor by the summary court-martial officer. A plea of guilty cannot be accepted by the summary court-martial officer unless he is satisfied that an accused voluntarily waives his right to a trial, understands the elements of the offense and the consequences of his plea. The accused is further advised that if tried by summary court-martial he will not be represented by appointed military counsel but that the summary court-martial officer (who subsequently determines the guilt or innocence of the accused) will thoroughly and impartially inquire into both sides of the matter and will assure that the interest of both the Government and the accused are safeguarded. The accused is further told that if he desires representation by appointed counsel he must object to trial by summary court-martial and that if his case is then referred to a special court-martial, he will be provided counsel. However, if the accused makes the decision that causes him to be tried before a special court-martial (with counsel) instead

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of a summary court-martial (without counsel) he subjects himself upon conviction to the possibility of a greater period of incarceration and stiffer ancillary punishment than would be possible in a summary court-martial.

At the outset, it should be understood that even in the case of an aggravated offense tried in special or general court-martial, the accused is not necessarily provided with a legal counsel who is trained as a lawyer or a member of the bar of some state. He is furnished a non-lawyer legal aide who has had training in the handling of trials in the military; a similarly trained member of the military personnel is assigned to handle the Government's prosecution of the charge.

The verified petition for a Writ of Habeas Corpus of Petitioners Daniel Edward Henry, John Thomas Kirby, and Kenneth Wayne McLean, individually and on behalf of all persons similarly situated, and the complaint of said Petitioners and of David Alan Haecker, A. C. Jackson, and Aubry Duglass Mims, individually and on behalf of all persons similarly situated, for injunctive, mandamus, and declaratory relief, together with motions for a temporary restraining order and preliminary injunction order designating the action as a class action, and an order allowing Petitioners to proceed in forma pauperis, were filed in this Court on February 16, 1973.

Petitioners Stephen L. Bray II and Michael A. Ness whose motion to intervene in the petition for a Writ of Habeas Corpus, and other requested relief, having been previously filed under an order shortening time, were allowed as party-intervenors pursuant to FRCiv.P 24(a)(2). This Court further ordered issuance of a Writ of Habeas Corpus as to Kirby, Bray II, and Ness and their immediate release from confinement pending further order of the Court with

regard to their respective convictions and sentencing by summary courts-martial. Finally, it was ordered that Respondent-Defendants (hereinafter Respondents) refrain from conducting any summary courts-martial within the territorial jurisdiction of this Court without affording the accused the assistance of counsel, pending further order of the Court.

At a subsequent hearing this court granted the motion by counsel for Petitioners that the hearing on the application for a preliminary injunction be consolidated with the trial of this action on the merits pursuant to FRCiv.P 65(a)(2), and that the named Petitioners be allowed to proceed in forma pauperis pursuant to 28 U.S.C. § 2250.

The trial procedure detailed above was and is the same procedure followed at all U.S. Navy and U.S. Marine Corps installations and stations in conducting trials by summary court-martial. That procedure will continue to be utilized unless otherwise ordered by a court of competent jurisdiction, according to the opinion issued by the Judge Advocate General of the U.S. Navy. The Judge Advocate General maintains that the decision of the United States Supreme Court in Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) is not applicable to military summary court-martial procedures. The precise holding of *Argersinger* is "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger* at 37, 92 S.Ct. at 2012.[1]

Since the filing of the Petition and Complaint herein, and upon a request in chambers by this Court to

[1] The U.S. Army and the U.S. Air Force have voluntarily applied the ruling in *Argersinger*, supra, to summary court-martial procedures.

Respondents, no summary court-martial has been conducted with respect to charges against Petitioners Haecker, Jackson, and Mims.

Service of process on each and all of the named Respondents was timely and properly made.

After hearing evidence and evaluating all papers filed with this Court, this Court grants Petitioners relief as a class pursuant to FRCiv.P 23(b)(2) and (c), defined below, in the form of habeas corpus pursuant to 28 U.S.C. § 2241 et seq. and in the nature of mandamus pursuant to 28 U.S.C. § 1361 against Respondents Warner, Zumwalt, and Cushman. It is further ordered that John E. Warner, Secretary of the Navy, Admiral Elmo Zumwalt, United States Navy, and General Robert E. Cushman, United States Marine Corps, direct their agents to insure that no summary courts-martial pursuant to 10 U.S.C. § 820 be commenced by the Navy or Marine Corps throughout the world unless the requirements of *Argersinger* are satisfied.[2]

It was to be ordered that the findings of guilt and sentence of Petitioners be vacated, subject, however, to retrial. As noted in Daigle v. Warner, 348 F. Supp. 1074 (D.Haw.1972), however, Navy regulations do not permit such retrial; thus, the respective sentences to

[2] In Mead v. Parker, 464 F.2d 1108 (9th Cir. 1972), the Ninth Circuit notes the appropriations of the mandamus and class action devices under these types of circumstances. 28 U.S.C. § 1361, grants the district courts original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiffs. This statute removes most of the difficulties which have limited actions against government officers or agencies which are in the nature of judicial review of administrative action. Included within this 1962 enactment are liberal provisions for venue and service of process in actions against federal agencies, officers, and employees. 28 U.S.C. § 1391(e).

confinement are adjudged invalid and the records of the proceedings are to be expunged.

LEGAL ANALYSIS

The central issue in this case as in Diagle v. Warner, supra, is whether the decision in *Argersinger* applies to summary courts-martial proceedings conducted under 10 U.S.C. § 820.

Two other issues raised by the parties and worthy of analysis are the problem of the exhaustion of military remedies and whether a class of plaintiffs and/or a class of defendants should be recognized by this Court.

[1] Granting Petitioners motion for a class action, I define the Petitioners class as all those persons who are members of the U.S. Navy and Marine Corps and who, 1) were or are now or will be required after April 16, 1973, to stand trial by summary courts-martial; 2) were not or are not advised of their right to assistance of counsel during their summary courts-martial proceedings, and if indigent, advised that counsel must be provided without cost; and, 3) had not made a knowing and intelligent waiver of counsel.

The requirements of FRCiv.P 23(a) have been met in that this action is being maintained by members of the class; the class is quite numerous numbering several thousand persons; the question presented is a pure question of law common to all members of the class: the validity of summary courts-martial proceedings pursuant to 10 U.S.C. § 820 without the assistance of counsel. In addition, there is a fact common to the entire class: each member of the class has been, will be, or could be tried by a summary court-martial and either faces or could face incarceration without benefit of counsel. The claims of the representative parties are thus typical of the claims of the entire class.

Because of this close identity the representative parties are thus typical of the claims of the entire class and will fairly and adequately protect the interests of the entire class.

Subsection (b) of FRCiv.P 23 provides that a class action may be maintained if the prerequisites of subdivision (a) are satisfied and one of the conditions set forth in subsection (b) are met. Among those conditions is "(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class. . . ."

[2] It is quite clear that Respondents have acted and continue to act on precisely the same ground as to each member of the class: respondents are denying U.S. Navy and Marine Corps personnel facing summary courts-martial the assistance of counsel notwithstanding *Daigle*. It follows that the within action is a proper class action in the nature of mandamus (Levi v. Tarr, 343 F.Supp. 1120 (N.D.Cal.1972)) and by writ of habeas corpus (Mead v. Parker, 464 F.2d 1108 (9th Cir. 1972)).

> "Nor can we agree that a petition for a writ of habeas corpus can never be treated as a class action. Certainly the usual habeas corpus case relates only to the individual petitioner and to his unique problem. But there can be cases, and this is one of them, where the relief sought can be of immediate benefit to a large and amorphous group. In such cases, it has been held, that a class action may be appropriate." *Mead* at 1112.

Necessity dictates that I consider concurrently with the issue of the existence of a class, whether this Court has jurisdiction over the appropriate Respondents so as to afford the class the relief they seek.

One argument put forth, and quite rightly, is that notwithstanding the scope of Petitioners' class, if this Court only has jurisdiction over a certain limited

number of Respondents then the relief to be afforded will be limited to those subject to the authority of said Respondents. For example, it has been suggested that only Brigadier-General F. C. Lang, Commander of the Marine Corps Air Station, Santa Ana, California, and Major-General H. S. Hill, Commander of the Marine Corps Air Station, Santa Ana, California, the only two Respondents residing in this District, are subject to the Court's jurisdiction. Following this suggestion, Petitioners would correspondingly be limited to those within the control of Lang and Hill.

[3] I reject this proposition and hold that the true custodians, those exercising ultimate control over the entire heretofore established class, are Respondents Secretary of the Navy Warner, Admiral of the Navy Zumwalt, and Commandant of the United States Marines Cushman.

The broad relief requested under the provisions of the Mandamus Act (28 U.S.C. § 1361), and by writ of habeas Corpus depends on whether this Court is able to reach by process Warner, Zumwalt, and Cushman.

Unquestionably, this Court's jurisdiction extends to the perimeters of the Central District of California. I agree with Petitioners that this Court's jurisdiction extends beyond this district in terms of the effect this ruling must have upon military personnel in the Navy and Marine Corps and in the custody of Warner, Zumwalt and Cushman. For the purposes of satisfying in personam jurisdiction and venue requirements, service of process has been completed in accordance with the provisions of 28 U.S.C. § 1391(e). The constitutional requisite minimum contacts with the Central District of California have been established in that two naval bases are located within this jurisdiction; thus, the maintenance of this suit against Respondents Warner, Zumwalt, and Cushman does not offend traditional notions of fair play and substantial justice.

International Shoe v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L. Ed. 95 (1945).

As previously stated, Mead v. Parker, supra, suggests the appropriateness of mandamus and habeas corpus relief under facts such as presented here. In *Mead*, however, the Ninth Circuit did not address itself to the broad scope of relief requested by our Petitioners.

I cannot agree with Petitioners that Braden v. Circuit Court of Kentucky, — U.S. —, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973) is dispositive of the question of whether the top military authorities in their respective chains of command may be deemed to be custodians of all persons under their command and authority, wherever situated.

In Strait v. Laird, 406 U.S. 341, 92 S.Ct. 1693, 32 L.Ed.2d 141 (1972), the Supreme Court suggests, however, at footnote 2 of the majority opinion, the possibility that such top officials, having "presence" by way of "contacts" in the various states, may properly be held to be custodians of all under their command and authority. Thus, serving process upon the Secretary of the Navy and the topmost commanding officers of the Navy and Marine Corps by virtue of 28 U.S.C. § 1391(e), should bring them under the jurisdiction of the federal district court for at least the purposes of a writ of habeas corpus. "Strait's commanding officer is 'present' in California through the officers in the heirarchy of the command who processed this serviceman's application for discharge." *Strait* at 145, 92 S.Ct. at 1695. In the same footnote the Supreme Court maintained: "That such 'presence' may suffice for personal jurisdiction is well settled, McGee v. Int'l Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957); Int'l Shoe Co. v. Washington, supra, and the concept is also not a novel one

as regards habeas corpus jurisdiction. In Ex parte Endo, 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243 (1944), we said that habeas corpus may issue 'if a respondent who has custody of the prisoner is within reach of the court's process . . .' Strait's commanding officer is 'present' in California through his contacts in that State; he is therefore 'within reach' of the federal court in which Strait filed his petition . . ." *Strait*, Footnote 2 at 145, 92 S.Ct. at 1695.

In Donigian v. Laird, 308 F.Supp. 449 (D.Md. 1969) the district court held as an open question whether the Secretary of Defense may be such custodian[3] but appears to hold that the Secretary of the Army *is* such a proper custodian if properly served. I note that *Donigian* may be distinguished from our facts in that plaintiff there had no ascertainable duty station. Positively holding that the Secretary of the Army and the Secretary of Defense are custodians for habeas corpus purposes when properly served is Silberberg v. Willis, 306 F. Supp. 1013 (D.Mass. 1969). See 2 Moore's Federal Practice 2nd ed., p. 1210. Not deciding the question but noting the conflict between *Donigian* and *Silberberg* is Armstrong v. Wheeler, 321 F.Supp. 471, 478 (E.D.Pa. 1970).

Finally, in the Ninth Circuit, the question appears to be left open in Jarrett v. Resor, 426 F. 2d 213 (9th Cir. 1970) by the last sentence of the opinion at 217. In Gregory v. Laird, 326 F.Supp. 704 (S.D.Cal. 1971), however, the Court arguably indicates at 708 that the Chief of Naval Personnel would have been a proper custodian if properly served.

[4] Justice Frankfurter in Burns v. Wilson, 346 U.S. 844, 74 S.Ct. 3, 98 L.Ed. 363 (1953) did not decide whether top military authorities in Washington

[3] "[A]lthough the status of the Secretary of Defense as a proper custodian is not free from doubt . . ." Donigian at 452.

were "custodians" of servicemen stationed anywhere in the United States. Certainly they may "open the doors of the jail" by merely ordering any subordinate who holds the key to do so. I hold that Respondent-Defendants Warner, Zumwalt, and Cushman are the custodians of the class herein described for the purpose of the writ of habeas corpus.

[5] With regard to "actual notice of the order", it should be noted that this requirement of Rule 23(d) was fulfilled in *Daigle* by Judge Pence ordering the respondents to assure that the members of petitioners' class be informed of their rights and that Respondents order all under their authority to comply with the provisions of the Court's order. I conclude that a similar order by this Court, made to apply everywhere within the authority of the Respondents, would likewise satisfy the notice requirements.

The need for an order of such scope is clearly apparent, in view of the fact that the Navy and Marine Corps have chosen not to apply the rulings of *Argersinger* and *Daigle* to every person under their authority, but only in the territorial jurisdiction of the Hawaiian District Court. In *Daigle*, the Court gratuitously limited the scope of its order, apparently with the optimistic view that the Navy and the Marine Corps would voluntarily apply the ruling to all under their authority. With perspective, this Court certainly has no basis for sharing such view.

I find it unnecessary to reach the issue of whether Respondents should be designated a class in order to qualify the designated class of Petitioners for said requested relief. Having decided that this Court has jurisdiction over the true custodians of all Petitioners, it is sufficient that this action be maintained as a class action by a class of Petitioners and *not* necessarily against a class of Respondents.

In Braden v. Circuit Court of Kentucky, supra, the Supreme Court announced that it is no longer required that habeas corpus petitions be brought only in the district of the petitioner's confinement. The majority opinion of Mr. Justice Brennan declares at 1130 of 93 S.Ct. "Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim, or requiring that he be released outright from custody, *even* if the prisoner himself is confined outside the Court's territorial jurisdiction." (emphasis added).

[6] Accordingly, those persons similarly situated as Petitioners herein, although outside this Court's territorial jurisdiction, may be the beneficiaries of the Court's writ of habeas corpus, wherever they are located at the time of its issuance. As members of the class of Petitioners herein, they are subject to this Court's writ so long as their respective custodian or custodians "can be reached by service of process."

[7] The Navy and the Marine Corps, through counsel, have suggested that Petitioners have not exhausted their military remedies, thus this Court is without jurisdiction to hear their claims. I hold that it would be futile to require that Petitioners must exhaust their remedies within the military system because Col. Chadwick, highest ranking judge advocate officer of 3d Marine Aircraft Wing, F.M.F. Pac., Marine Corps Air Station, El Toro, Santa Ana, Calif., stated in a Staff Judge Advocate Memorandum dated October, 1972, that it was the position of the command, in accord with the opinion of the Judge Advocate General of the Navy, that *Argersinger* did not

apply to summary courts-martial. "The petitioner cannot properly be required to exhaust a remedy which may not exist." Parisi v. Davidson, 405 U.S. 34, 92 S.Ct. 815, 821, 31 L.Ed.2d 17 (1972).

Further, Colonel Max Halliday, Assistant Judge Advocate General for the Navy, actively participated for the defense in *Daigle* supra and contended that *Argersinger* was inapplicable to summary courts-martial.

The language and logic of these cases compel me to conclude as did the Court in *Daigle:* Acknowledging the special attributes of military justice these attributes "cannot justify denial of basic constitutional rights, when both these rights and the needs of the military can be successfully accommodated. By applying *Argersinger* to summary courts-martial, this court is not burdening the military with an inflexible and impossible requirement." *Daigle* 348 F.Supp. at 1080.

In an attempt to avoid merely reiterating the well-reasoned *Daigle* opinion, suffice to say that this Court incorporates by reference its discussion regarding the applicability of *Argersinger* to summary courts-martial proceedings under 10 U.S.C. § 810.

[8] I would, however, emphasize several points. Stressing flexibility with respect to the decision as did Justice Brennan in his concurrence in *Argersinger*, the Court in *Daigle* maintained that the type and quality of representation required under *Argersinger* must vary perforce with the context of each particular case.

Undeniably, the Supreme Court was concerned with the apparent disparity in the dispensation of justice between those who were and those who were not represented by counsel: "There is evidence of the prejudice which results to misdemeanor defendants from this 'assembly-line justice.' One study concluded

that 'Misdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel.' ACLU, Legal Counsel for Misdemeanants, Preliminary Report, 1 (1970)." *Argersinger* 407 U.S. at 36, 92 S.Ct. at 2012.

In *Daigle,* as here the Government argued that petitioners could have opted for general or special courts-martial and thus benefit from counsel. The Court in *Daigle* saw through this surface logic and recognized that by objecting to the summary court-martial proceeding (thus obtaining counsel) the accused is forced to run the risk of receiving a greater punishment sanctioned by the general and special courts-martial. The result flies in the face of the Supreme Court's articulated position against the doctrine of unconstitutional conditions—i. e., one cannot be 'punished' for the exercise of one's constitutional rights. United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). Further, unconstitutional conditions on unemployment compensation (Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)), tax exemptions (Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)), public employment (Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed2d 811 (1968)), bar admissions (Baird v. State Bar of Arizona, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971)), and mailing privileges (Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971)) have all been invalidated by the Supreme Court. In all of these cases, citizens were left free to exercise their constitutional rights so long as they were willing to give up a "gratuity" which the State had no obligation to provide. Yet in each the Supreme Court found that the discriminatory provi-

sion of a privilege placed too great a burden on constitutional freedoms.

[9] Further, I reject the Government's argument that the peculiar needs of the military demand that *Argersinger* requirements not be applied to summary courts-martial. There is no logical basis for the conclusion that an accused member of the military who might be imprisoned if convicted is any less in need of legal counsel than an accused civilian. Just as the Navy and Marine Corps meet the requirement of providing counsel for personnel accused of aggravated offenses, wherever the trial is held, so must it provide counsel for misdemeanants if the specter of imprisonment is present or possible.

[10] Finally, the Government's argument that the summary court officer who serves as judge, prosecutor, and defense attorney, charged with assuring "that the interests of both the Government and the accused are safeguarded," satisfies *Argersinger* is rejected. The accused even in a summary court-martial is "entitled to his *own* counsel and not a multipurpose official who must assume three conflicting roles at the same time." Cf. In Re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

Argersinger is anchored in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) and Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) *Argersinger,* 407 U.S. at 31, 92 S.Ct. 2006.

The Supreme Court in *Gideon* states 372 U.S. at 344, 83 S.Ct. at 796: ". . . in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . ." Stepping beyond *Gideon* the Court in *Argersinger* insisted: "Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no

imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel.

"Further, the run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy."

This shall be considered a judgment on the merits (FRCiv.P 65(2)) and is binding upon the parties to this action, their officers, agents, servants, employees and attorneys.

APPENDIX D

United States District Court
Central District of California

No. 73-354-DWW

DANIEL EDWARD HENRY, ETC., ET AL., INDIVIDUALLY AND OF BEHALF OF ALL PERSONS SIMILARLY SITUATED, AND STEPHEN L. BRAY II AND MICHAEL A. NESS, INTERVENORS, PETITIONERS-PLAINTIFFS

v.

HONORABLE JOHN E. WARNER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE NAVY; ET AL., RESPONDENTS-DEFENDANTS

Judgment

This action came on for hearing before the Court, Honorable David W. Williams, District Judge, presiding, and the issues having been duly heard, and the judgment herein being in accordance with the findings of fact and conclusions of law contained in the memorandum opinion filed heretofore in this action pursuant to F.R. Civ. P. 52(a).

It is Ordered and Adjudged that:

I. Petitioners-Plaintiffs' and Intervenors' (hereinafter "Petitioners") motion for a class action is GRANTED; said class action is determined to be maintainable pursuant to F.R. Civ. P. 23 (b)(3) and (c) on behalf of a Petitioner class defined to be composed of all those persons who are members of the U.S. Navy and Marine Corps and who, 1) were or

are now or will be required after April 16, 1973, to stand trial by summary courts-martial; 2) were not or are not advised of their right to assistance of counsel during their summary courts-martial proceedings, and if indigent, advised that counsel must be provided without cost; and 3) had not made a knowing and intelligent waiver of counsel.

II. A writ of habeas corpus is hereby granted on behalf of Petitioners DANIEL EDWARD HENRY and KENNETH WAYNE McLEAN, in addition to that previously granted on behalf of Petitioners JOHN THOMAS KIRBY, STEPHEN L. BRAY II, and MICHAEL A. NESS, and said writ is further granted on behalf of each and every member of said Petitioner class as defined herein; and that pursuant to said writ, Respondents JOHN E. WARNER, Secretary of the Navy; ADMIRAL ELMO ZUMWALT, U.S. Navy, Chief of Naval Operations; and GENERAL ROBERT E. CUSHMAN, Commandant, U.S. Marine Corps, are hereby ordered forthwith to direct their agents and officers immediately to release from confinement said Petitioners HENRY and McLEAN and each and every member of said Petitioner class who on and after the date of entry of this Judgment is confined by Respondents pursuant to conviction and sentence at respective summary courts-martial.

III. Said Respondents WARNER ZUMWALT, and CUSHMAN, shall order their officers, agents, servants, employees, attorneys and all persons in active consert or participation with them, including but not limited to type commanders, area coordinators, and Marine Corps Force Commanders, to:

A. (1) Issue forthwith orders and/or directives to insure that:

No summary court-martial proceedings pursuant to Article 20, UCMJ; 10 U.S.C. § 820, be commenced, initiated, or otherwise held by a commanding officer

or officer-in-charge of the Navy or Marine Corps command; or activity of the Department of the Navy anywhere in the world, unless and until the accused in said proceeding has been apprised of the constitutional requirements of *Argersinger* v. *Hamlin*, 407 U.S. 25, 32 L. Ed. 2d 533, 92 S. Ct. 2006 (1972).

(2) *Argersinger* v. *Hamlin*, *supra*, requires that no accused may be deprived of his liberty at any judicial proceeding or criminal prosecution, unless the accused has been afforded an opportunity for the assistance of counsel, both prior to and during the proceeding or prosecution. Absent a knowing and intelligent waiver, the opportunity for the assistance of counsel, both prior to and during the summary court-martial proceeding, must be provided to the accused, and if the accused is indigent, counsel must be provided to the accused without cost.

B. Order that no such commanding officer or officer-in-charge of a Navy or Marine Corps command or activity of the Department of the Navy shall refer any Charge Sheet for trial to a summary court martial to be held anywhere in the world unless such order of reference (commonly the first endorsement on the Charge Sheet) is subject to instruction that confinement at hard labor is not an authorized punishment unless:

1. The accused is advised of his right to counsel, and

2. The accused is afforded an opportunity for the assistance of counsel both prior to and during the summary court-martial proceeding, and

3. The accused is advised that if he is indigent, counsel must be provided to him without cost, and

4. That after the accused is advised of the above, the accused may make a knowing and intelligent waiver of his right to the assistance of counsel.

IV. This Court shall retain jurisdiction over this matter until further order of the Court.

V. This Court orders the Respondents WARNER, ZUMWALT and CUSHMAN to give notice forthwith by appropriate directives or orders requiring the appropriate commanders to notify individually all those members of the class described above in Paragraph 1 of this Judgment who were convicted after June 12, 1972 or are presently scheduled to stand trial at summary court-martial proceedings. Such directives and orders shall instruct those members of the class that they have the right to challenge the validity of their convictions in their respective cases.

This Court further ORDERS the Respondents WARNER, ZUMWALT, and CUSHMAN to give notice forthwith to all those members of the class described above in Paragraph 1 of this Judgment who hereafter may be required to stand trial at summary court-martial proceedings, said notice to be given through the procedure outlined in Paragraph III B of this Order.

VI. The findings of guilty and the sentences in the cases of Petitioners HENRY, KIRBY, McLEAN, BRAY II, and NESS, each and all are hereby vacated and are null and void and of no force and effect, and Respondents are directed to ensure that the service record books and pay records of said Petitioners and other official documents of the United States Marine Corps are corrected to expunge any reference thereto therein contained. All rights, privileges, and property of which said Petitioners have been deprived by execution of said sentences shall be restored.

Dated at Los Angeles, California, this 17th day of April, 1973.

United States District Judge.

APPENDIX E

United States Court of Appeals for the Ninth Circuit

No. 73-1694

DANIEL EDWARD HENRY, ETC., ET AL.,
PETITIONER-APPELLEES

v.

HON. JOHN E. WARNER, ETC., ET AL.,
RESPONDENTS-APPELLANTS

Order

Before: DUNIWAY, ELY, and TRASK, *Circuit Judges.*

The Appellees' application for leave to file a portion of the transcript of proceedings in the District Court, said application having been filed herein on April 30, 1973 is granted. The transcript is attached to the Appellees' application, and the Clerk is directed to file it.

The Appellees' "Petition and/or Request for Reconsideration . . ." of this Court's Order of April 19, 1973, is denied.

The Appellants' Motion for a stay of the District Court's judgment of April 17, 1973 is granted, and said judgment is stayed pending the disposition of the subject appeal or this court's disposition of the appeal in *Daigle v. Warner*, 348 F. Supp. 1074 (D.C. Hawaii 1972) (this court's No. 72-2801).

BEN C. DUNIWAY,
WILBUR ELY,
ORALL W. TRASK,
United States Circuit Judges.

APPENDIX F

OFFICE OF THE CLERK,
Washington, D.C., June 4, 1973.

NATHAN R. ZAHN, Esq.,
4422 Sherman Oaks Circle,
Sherman Oaks, Calif.

RE: Daniel Edward Henry, et al. v. John E. Warner, individually and in his capacity as Secretary of Navy, et al., Application A-1124

DEAR SIR: The Court today entered the following order in the above-entitled case:

The application for an order to vacate in part the order of the United States Court of Appeals for the Ninth Circuit, dated May 8, 1973, presented to Mr. Justice Douglas, and by him referred to the Court, is denied.

Very truly yours,

MICHAEL RODAK, JR.,
Clerk.

By HELEN TAYLOR (MRS.),
Assistant Clerk.

APPENDIX G

United States Court of Appeals, Ninth Circuit.

No. 72-2801.

ROBERT M. DAIGLE, AND TERRY LEE CROSBY, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, PETITIONERS-APPELLEES, AND

JACK NAZIMEK *et al.*, PETITIONERS, INTERVENORS-APPELLEES,

v.

HONORABLE JOHN E. WARNER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE NAVY, *le al.*, RESPONDENTS-APPELLANTS.

Oct. 24, 1973.

As Amended on Denial of Rehearing
Jan. 29, 1974.

Before KOELSCH, WRIGHT and TRASK, *Circuit Judges.*

Opinion

EUGENE A. WRIGHT, *Circuit Judge:*

[1] In this habeas corpus proceeding, petitioners attack their convictions at summary courts-martial on the basis that they were not afforded representation by counsel. We must decide whether the Sixth Amendment's guarantee of counsel in criminal prosecutions, as interpreted and applied in Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d

530 (1972),[1] is applicable to trials before summary courts-martial. We hold that it is not. We must also decide whether the Fifth Amendment's guarantee of due process of law requires the military to appoint counsel in every case in which the defendant is sentenced to confinement. We hold that it does not. We therefore reverse the judgment of the district court, 348 F. Supp. 1074 (D. Haw. 1972), granting petitioners writs of habeas corpus.[2]

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[1] In *Argersinger* the Supreme Court held that the Sixth and Fourteenth Amendments require the states to provide appointed counsel for all defendants upon whom a sentence of imprisonment is imposed. *Argersinger* was the culmination of 40 years of case law interpreting and applying the Sixth Amendment's guarantee of counsel in "all criminal prosecutions." See Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (appointed counsel required in all state felony prosecutions); Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) (appointed counsel required in all federal prosecutions); Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932) (appointed counsel required in a capital case). See also Coleman v. Alabama, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970); Mempa v. Rhay, 389 U.S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967); United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964); Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961). *Cf.* Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).

The reasons which compelled the Supreme Court in *Argersinger* to conclude that appointed counsel was required in *any* criminal prosecution which resulted in a sentence of confinement were partly historical and partly in the nature of policy.

In the first place, history lent little support to the argument of the State of Florida that the Sixth Amendment required the presence of counsel only when the defendant was accused of a serious felony. At common law "persons accused of misde-

I. THE FACTS

There were six petitioners before the district court, including the four intervenors. Each was an enlisted member of the Marine Corps stationed in Hawaii.

meanors were entitled to the full assistance of counsel." Powell v. Alabama, *supra*, at 60 of 287 U.S., at 61 of 53 S. Ct.

But a person charged with treason or a felony "was denied the aid of counsel, except in respect of legal questions which [he] himself might suggest." *Id.* While this latter rule had been changed as to treason after the revolution of 1688, it remained the rule in England at the time of the American Revolution. The great accomplishment of the Sixth Amendment was the adoption of the practice followed in most (if not all) of the colonies of allowing the assistance of counsel to the accused in felony as well as misdemeanor cases. And the decision in Johnson v. Zerbst, *supra*, settled the rule that "assistance of counsel" meant assistance of appointed counsel if the accused could not afford to retain a lawyer.

Long prior to *Argersinger* it was held that the Sixth Amendment right to counsel applied to misdemeanors as well as serious offenses. See Evans v. Rives, 75 U.S. App.D.C. 242, 126 F.2d 633 (1942). At issue in *Powell*, *Gideon* and *Argersinger* was the extent to which the Sixth Amendment guarantees were made applicable to the states by the Fourteenth Amendment. But in this context the *Argersinger* result (that the Sixth Amendment right to counsel was fully applicable to the states) was probably inevitable after Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

An historical analysis was not the only component of the *Argersinger* decision. As the court noted:

> "The requirement of counsel may well be necessary for a fair trial even in a petty offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more." 407 U.S. at 33, 92 S. Ct. at 2010.

[1a] The government argues that the appellants' claim should be dismissed for failure to exhaust the administrative remedies available under UCMJ Article 69 (review by the office of The

In June, 1972, Petitioner Daigle was informed that he would be tried by a summary court-martial on charges of disobeying an order and possession of two identification cards with intent to deceive. He requested information concerning the assistance of counsel and was advised that he could consult with a legal officer prior to the court-martial but did not have the right to the assistance of military counsel during the proceedings.

Daigle consulted with a member of the Judge Advocate General's Corps prior to his trial, and was advised of his options with respect thereto. He asked the Judge Advocate officer to assist him at trial but was told that under the Uniform Code of Military Justice [hereinafter UCMJ] and the Manual for Courts-Martial [hereinafter MCM] he was not entitled to have military counsel represent him at trial, although he could have retained civilian counsel.

Daigle appeared at the court-martial, pleaded guilty and was sentenced, *inter alia*, to confinement at hard labor for twenty days.

Judge Advocate General) and UCMJ Article 138 (review by the officer exercising general court-martial jurisdiction). The government's argument is rejected. One of the policies underlying the exhaustion of administrative remedies doctrine is to allow administrative agencies an opportunity, prior to judicial review, to apply their discretion and expertise to problems within their competence. But where, as here, the issue is purely legal, this policy is not applicable. McKart v. United States, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969). As in *McKart*, this case involves criminal or quasi-criminal penalties, relief from which would be delayed by the application of the exhaustion doctrine. Where such a situation exists, administrative remedies need not be exhausted prior to review of a purely legal issue. We explicitly refrain from determining the applicability of *McKart* to cases in which criminal sanctions are not involved.

Also in June, Petitioner Crosby was informed that he would be tried on three charges by a summary court-martial on July 6, 1972. He, too, was told that he might first consult a legal officer and did so. No lawyer was provided for him at trial. He pleaded guilty to the first charge (disobeying an order) and not guilty to the other two charges. On these latter two he was acquitted after a trial and was sentenced, *inter alia*, to confinement at hard labor for thirty days.

Petitioner Chadwick's situation generally resembled that of Daigle and Crosby, except that when he went to the Naval Law Center to seek advice he was told by a non-lawyer that he should plead guilty because he would probably receive only a light sentence. He, too, was sentenced to confinement at hard labor for thirty days.

Petitioner Robinson was convicted after a plea of not guilty to a charge of sleeping on guard duty. He did not have assistance of counsel at his trial nor does the record indicate that he ever consulted with an attorney before trial. He was sentenced to multiple punishments, including confinement at hard labor for thirty days. He has always maintained his innocence of the charges against him.

Petitioner Nazimek was convicted of unauthorized absence. He had consulted with a Judge Advocate officer prior to trial and pleaded guilty at the trial. He was sentenced to confinement for fifteen days.

Petitioner Johnson was also convicted of a variety of specifications upon his plea of guilty and sentenced to 29 days confinement.

The proceedings in the district court are described in some detail in that court's opinion filed on August 31, 1972, Daigle v. Warner, D.C., 348 F.Supp.

1074. There is no need to repeat that description here. The court held that *Argersinger* does apply to the military and further:

> "Whether considered in terms of due process or the Sixth Amendment right to counsel, this court holds that the type and quality of representation which must be provided under *Argersinger* to summary courts-martial perforce may vary with the context of each particular case." 348 F.Supp. at 1080.

The court concluded that, in light of the number of available military lawyers in Hawaii, counsel should have been provided to each accused and granted the writ of habeas corpus as to Petitioners Robinson and Crosby, the only petitioners who had not completed their sentences when the court ruled. As to the other petitioners, the court ordered the records of their convictions expunged.

II. THE SUMMARY COURT-MARTIAL SYSTEM

The UCMJ provides for three types of courts-martial: general, special and summary.[2] A general court martial has jurisdiction, subject to constitutional limitations,[3] over all persons subject to the UCMJ for any offense thereunder.[4]

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[2] UCMJ, Art. 16, 10 U.S.C. § 816.

[3] See O'Callahan v. Parker, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969); McElroy v. United States ex rel. Guagliardo, 361 U.S. 281, 80 S.Ct. 305, 4 L.Ed.2d 282 (1960); Grisham v. Hagan, 361 U.S. 278, 80 S.Ct. 310, 4 L.Ed.2d 279 (1960); Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960); Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957); United States ex rel. Toth v. Quarles, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955).

[4] UCMJ, Art. 18, 10 U.S.C. § 818.

The special court-martial has jurisdiction concurrent with the general court-martial as to all noncapital offenses.[5] However, the special court does not have power to sentence the accused to dismissal from the service, to a dishonorable discharge, or to confinement for more than six months.[6]

The jurisdiction of summary courts-martial is set out in Article 20 of the UCMJ, 10 U.S.C. § 820, as follows:

> Subject to section 817 of this title (article 17) summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.

The function of a summary court-martial is to dispense justice and administer discipline promptly for relatively minor offenses under simplified procedures. MCM, Para. 79a (1969).

[5] UCMJ, Art. 19, 10 U.S.C. § 819.

[6] *Id.*

The accused before a special or general court-martial is ordinarily entitled to full assistance counsel.[7] A summary court-martial, however, has no adversary counsel on either side. The court consists of one commissioned officer (generally a non-lawyer) who acts as judge, fact finder, prosecutor and defense counsel.[8]

The record of trial of every summary court-martial is first reviewed by the officer who convened the

[7] UCMJ, Arts. 27, 38, 10 U.S.C., §§ 827, 838.

[8] The mandate of the summary court officer is found in MCM, Para. 79a (1969):

> "The summary court will thoroughly and impartially inquire into both sides of the matter and will assure that the interests of both the Government and the accused are safeguarded."

More specifically, the summary court officer must inform the accused of the charges against him, the name of the officer who convened the court, and the identity of the accuser. MCM, Para. 79d(1). The summary court officer has authority to subpoena witnesses and must call witnesses desired by the accused. MCM, Para. 79b and d(3). He must advise the accused of his right to remain silent. MCM, Para. 79d(1) and (3). Should the accused elect to plead guilty to any specification or charge, the officer must explain to him the elements of the offense to which his guilty plea relates, explain that the guilty plea admits without further proof every element charged, and advise the accused of the maximum sentence which can be imposed upon conviction. The officer may not accept the plea unless, after questioning the accused, he is satisfied "not only that the accused understands the meaning and effect of his plea and admits the allegations . . . but also that he is voluntarily pleading guilty because he is convinced that he is in fact guilty." MCM, Para. 79d(2); United States v. Care, 18 USCMA 535, 40 CMR 247 (1969).

The accused is accorded the right to be informed of and to confront the witnesses against him. MCM, Para. 79d(1) and (3). He may cross-examine adverse witnesses or have the summary court officer cross-examine for him. MCM, Para. 79d(3). He may present evidence on his own behalf and is entitled to

court.[9] Thereafter, it must be reviewed by a judge advocate, an officer generally on the staff of the supervisory authority.[10] An additional appeal may then be made to the Judge Advocate General of the appropriate service.[11]

III. THE APPLICABILITY OF THE SIXTH AMENDMENT RIGHT TO COUNSEL TO TRIALS BY COURTS-MARTIAL

Some courts and scholars, notably the United States Court of Military Appeals and its Chief Judge, Robert E. Quinn, have taken a broad view of the applicability of the provisions of the Bill of Rights to members of the military service. See United States v. Tempia, 16 USCMA 629, 37 CMR 249 (1967); United States v. Jacoby, 11 USCMA 428, 29 CMR 244 (1960) ("[T]he protections of the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."); Quinn, The United States Court of Military Appeals and Military Due Process, 35 St. John's L.Rev. 225 (1961); Quinn, United States Court of Military Appeals and Individual Rights in the Military Service, 35 Minn.L.Rev. 49 (1960). In United States v. Culp, 14 USCMA 190, 33 CMR 411 (1963) two judges of the three-judge COMA held that the

have the court assist him in every possible way. *Id.* He may testify on his own behalf. MCM, Para. 79d(1) and (3). After findings of guilt are announced, the accused may present evidence in extenuation and mitigation, with the assistance of the court-martial officer if the accused desires. MCM, Para. 79d(4). Finally, the accused may make either a sworn or unsworn statement in extenuation and mitigation. *Id.*

[9] USMJ, Art. 60, 10 U.S.C. § 860.

[10] USMJ, Art. 65, 10 U.S.C. § 865; MCM, Para. 94.

[11] UCMJ, Art. 69, 10 U.S.C. § 869.

Sixth Amendment right to counsel applies to special courts-martial but that the right was not abridged in that case.[12] There is little textual or historical support, however, for the conclusion that the framers of the Bill of Rights intended the Sixth Amendment right to counsel to apply to trials before courts-martial.

[2, 3] The Sixth Amendment was not intended to revolutionize criminal procedure. All rights secured by it were available to the accused at common law or under modifications to the common law adopted in the American colonies.[13] The Sixth Amendment's impact was as a "full and distinct recognition" of the rights secured to an accused at common law. Callan v. Wilson, 127 U.S. 540, 549, 8 S.Ct. 1301, 32 L.Ed. 223 (1888). Thus, the Amendment secures to the accused

[12] At issue in *Culp* was the constitutionality of former Article 27(c), UCMJ, 10 U.S.C. § 827(c). The article, as it then read, permitted the convening authority to detail non-lawyer counsel for the accused in a special court-martial if the prosecution did not have lawyer counsel.

All three judges of COMA agreed that appointment of non-lawyer counsel did not violate the accused's constitutional rights. Judge Kilday felt that the Sixth Amendment right to counsel did not apply to the military. Judges Quinn and Ferguson were of the opinion that while the Amendment did apply to the military, the article was constitutional because Congress had the power to set the qualifications of counsel before courts-martial. *See also* Angle v. Laird, 429 F.2d 892 (10th Cir. 1970); Harris v. Ciccone, 417 F.2d 479 (8th Cir. 1969); Kennedy v. Commandant, 377 F.2d 339 (10th Cir. 1967); LeBallister v. Warden, 247 F.Supp. 349 (D.Kan. 1965). *But see* Application of Stapley, 246 F. Supp. 316 (D.Utah 1965).

COMA currently has before it for decision a case which may present the identical issue before us. In re McLean, Misc.Dkt. No. 73-5.

[13] *See* note 1, *supra*.

the right to jury trial for all "serious offenses" [1] because that was the extent of the colonial right to jury trial. District of Columbia v. Clawans, 300 U.S. 617, 624, 57 S.Ct. 660, 81 L.Ed. 843 (1937); Callan v. Wilson, *supra*. See Frankfurter & Corcoran, Petty Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv.L.Rev. 917 (1926). But see Kaye, Petty Offenders Have No Peers!, 26 U.Chi.L.Rev. 245 (1959). In addition, the Sixth Amendment guarantees an accused counsel for his defense in *all* civilian criminal prosecutions, serious or petty (at least to the extent a sentence of confinement is imposed, *Argersinger, supra*, at 37 of 407 U.S., 92 S.Ct. 2006), because that was the extent of the right of counsel at common law, as modified in the colonies, *Argersinger, supra;* Powell v. Alabama, 287 U.S. 45, 60, 53 S.Ct. 55, 77 L.Ed. 158 (1932). But in light of the 18th century practice in America, it cannot be said that the Amendment was intended to be wholly applicable to defendants before military courts. For example, the Amendment's guarantee of the right to jury trial was not intended to apply to military courts. Ex parte Quirin, 317 U.S. 1, 45, 63 S.Ct. 1, 87 L.Ed. 3 (1942). By the same token the Amendment was not intended to extend the scope of the accused's right to counsel before military courts beyond what it had theretofore been.

[4] It has been clearly shown that in the late 18th century the right of an accused before a court-martial to have assistance of counsel for his defense was severely limited. See Wiener, Courts Martial and the Bill of Rights: The Original Practice I, 72 Harv. L. Rev. 1 (1958). Certainly there was no right to have

[1] "Serious offenses" are now considered to be those punishable by imprisonment for greater than six months. Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970).

personal, adversary counsel of the sort required in state and federal courts by *Argersinger*. We cannot improve on Colonel Wiener's detailed historical analysis, and we need say only that we agree with his conclusion that the Sixth Amendment was not intended to apply to trials before courts-martial.

IV. THE EXTENT TO WHICH COUNSEL IS REQUIRED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

[5] Our conclusion that the Sixth Amendment does not compel the result reached by the district court does not end the inquiry. Courts-martial are required to afford an accused due process of law. Burns v. Wilson, 346 U.S. 137, 142–143, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953). Due process is an evolving concept and what is due process at one point in history may not be so regarded as civilization develops.

We have two recent guideposts from the Supreme Court on the extent due process required counsel in situations where confinement may be imposed but the Sixth Amendment does not apply. See Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

In *Gault* the Court held that a juvenile charged with delinquency and subject to commitment to an institution was entitled to have counsel appointed to represent him.

> "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has

> a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.'" 387 U.S. at 36, 87 S.Ct. at 1448. (footnotes omitted.)

In *Gagnon* the court held that personal, adversary counsel was not a constitutional requirement in every parole or probation revocation proceeding. Specifically, the court held:

> "[T]he decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees." 411 U.S. 778 at 790, 93 S. Ct. 1756, 1763, 36 L. Ed. 2d 656.

In our view the present case is better analogized to *Gagnon* than to *Gault*. In the first place, servicemen before summary courts-martial are adults, not juveniles. Underlying *Gault* is the assumption that uncounseled juvenile defendants would ordinarily have great difficulty presenting whatever defense or mitigating circumstances they might have. That assumption does not apply in this case.

Second, a summary court-martial is disciplinary in nature and less of an adversary, accusatory proceeding than were the juvenile court hearings considered in *Gault*. It is more like the parole revocation proceeding in the sense that certain informality and flexibility which may be desirable in some cases would be lost by requiring adversary counsel in all cases.

Finally, although that was not a factor in either *Gault* or *Gagnon*, we note that the penalties which

can be imposed by a summary court-martial are quite restricted. At least any resulting injustice would not be of the same significance as those arising from juvenile or parole revocation proceedings.

[6] *Gagnon* suggests the appropriate due process standard. In *Gagnon* the Court held that a probationer or parolee has a presumptive right to counsel at a probation or parole revocation hearing

> "in cases where, after being informed of his right to counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present." 411 U.S. at 790, 93 S.Ct. at 1764.

The exigencies of military discipline and the need for flexibility require a modification of this standard for summary courts martial. Counsel should be required only where the issues are of sufficient complexity to require his assistance, even if the defendant raises a colorable claim that he has not committed the offense. Therefore, we hold that counsel must be appointed for the accused before a summary court-martial only where the accused makes a request based on a timely and colorable claim (1) that he has a defense, or (2) that there are mitigating circumstances, and the assistance of counsel is necessary in order adequately to present the defense or mitigating circumstances. Moreover, even when such a request is made, if, due to the exigencies of military operations, qualified counsel is not reasonably available, the military may nevertheless proceed if the rights of the accused

will not be unduly prejudiced. But no such difficulties are present in this case.

[7] In the present case five of the petitioners pleaded guilty on the charges of which they were convicted, four after consulting with military counsel. The burden will be upon them to convince the district court that the assistance of counsel at their trial was necessary in order for them properly to present some defense or mitigating circumstances.

[8, 9] As to petitioner Robinson, who pleaded not guilty and protested his innocence, the situation may be quite different. The government should have the burden of showing that his defense was not "colorable" or was in fact one that he could present adequately by himself. Whether it has met or can meet this burden must be a question for the district court to resolve in the present case, and for the military justice system itself to resolve in future cases, subject to limited judicial review in habeas proceedings under the "fully and fairly" test. Burns v. Wilson, *supra*.[15]

V. CONCLUSION

Our conclusion that the Constitution does not require appointed counsel in every summary court-martial case should not be read as an unqualified endorsement of the practice which limits the availability of

[15] Burns v. Wilson held that "when a military decision had dealt fully and fairly with an allegation raised in [the] application [for a writ of habeas corpus], it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence." 346 U.S. at 142, 73 S.Ct. at 1049.

This court has considered the "fully and fairly" test in Sunday v. Madigan, 301 F.2d 871 (1962), and Mitchell v. Swope, 221 F.2d 365 (1955). *Cf.* Kaufman v. Secretary of the Air Force, 135 U.S.App.D.C. 1, 415 F.2d 991 (1969); Kennedy v. Commandant, 377 F.2d 339 (10th Cir. 1967). *See*, generally, Moyer, Justice and the Military 1230–1262 (1972).

such counsel. While the Navy argues with some vigor that naval discipline will suffer severely if appointed counsel are required, there is scant support of this in the record. The Army and Air Force already provide counsel to all accused before summary courts-martial and the Navy allows private retained counsel to participate in such proceedings.

The Navy suggests that the effectiveness of a summary court-martial as a tool for preserving discipline and order will be undermined by the participation of counsel. If so, this must already be true as to those defendants who can afford retained counsel. *Cf.* Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

Justice Powell opined in Argersinger v. Hamlin, *supra*, at 63 of 407 U.S., 92 S.Ct. 2006 (concurring opinion), that the case-by-case analysis avoided the equal protection problem suggested by Douglas v. California. Perhaps this is true. In any event the equal protection ground is not urged before us.[16]

Whether the case-by-case rule will prove administratively feasible is another matter, and one for the Navy to resolve in the first instance. The case-by-case approach established in Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942) could not endure, but summary courts-martial are not felony trials. More experience over a period of time may supply the answer.

The judgment of the district court is reversed. As to all petitioners and intervenors, except Robinson, the petitions should be denied. The district court should conduct further proceedings as to Robinson, consistent with this opinion.

[16] *Cf.* Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

TRASK, Circuit Judge (concurring and dissenting):

I concur with the majority except as to that portion which would require counsel to be provided to the defendant under certain circumstances in order to meet due process requirements.

It appears clear to me that the protections accorded to the defendant in a summary court-martial as outlined in footnote 8 of the majority opinion satisfy the demands of basic fairness inherent in constitutional due process as applied to a code of military justice. A reading of Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), and In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), does not persuade me to the contrary. Burns v. Wilson, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953), was decided in an entirely different context and does not control a resolution of the problem here.

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